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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Austin Flake and Logan Flake,
Plaintiffs,
v.
Joseph Michael Arpaio; et al.,
Defendants

No. CV-15-01132-PHX-NVV

DEFENDANT MARICOPA COUNTY'S RESPONSE TO PLAINTIFFS' MEMORANDUM REGARDING THE COURT'S PROPOSED MALICIOUS PROSECUTION INSTRUCTION

Defendant Maricopa County (the “County”), pursuant to the Court’s instructions, *see* Doc. 281, hereby responds to Plaintiffs’ Memorandum Regarding the Court’s Proposed Malicious Prosecution Instruction (Doc. 284).

I. The second element of the Court's proposed instruction is proper.

Plaintiffs claim that the second element of the Court’s proposed final jury instruction on malicious prosecution (“[t]hat the defendant acted for a primary purpose other than to bring an offender to justice”) is not an element of the claim under Arizona law. Doc. 284 at 3. This is not entirely accurate. What Plaintiffs fail to acknowledge is that the fourth element of a claim for malicious prosecution, as set forth in the Revised Arizona Jury Instructions (the “RAJIs”), is that “[Name of defendant] acted with malice.” See RAJIs (6th Ed., July 2013), attached to Doc. 284 as Exhibit B; *see also* Doc. 284 at 2-3. There can be no question that *malice* is an element of malicious prosecution under Arizona law, which is hardly surprising given the very name of the tort.

1 The RAJIs do not define malice, but Arizona law does – and it defines malice just as
2 the Court has done. The Arizona Supreme Court has defined the elements of malicious
3 prosecution as follows:

- 4 a. A criminal proceeding instituted or continued by the defendant against the
5 plaintiff.
6 b. Termination of the proceeding in favor of the accused.
7 c. Absence of probable cause for the proceeding.
8 d. ‘Malice,’ or a primary purpose in instituting the proceeding other than that
of bringing an offender to justice.

9 *Sarwark Motor Sales, Inc. v. Woolridge*, 354 P.2d 34, 36 (Ariz. 1960) (*citing* Prosser, Law
10 of Torts, § 98 (2d ed.); 1 Harper and James, Law of Torts, § 4.1; RESTATEMENT OF TORTS,
11 § 653); *see also Meadows v. Gant*, 486 P.2d 216, 217 (Ariz. Ct. App. 1971) (defining the
12 malice element of malicious prosecution as “a primary purpose other than that of bringing
13 an offender to justice”); *Adams v. Estrada*, No. 2 CA-CV 2013-0074, 2014 WL 265660, at
14 *10 (Ariz. Ct. App. Jan. 23, 2014) (“[M]alicious prosecution requires plaintiff to prove ...
15 the defendant acted primarily for a purpose other than bringing an offender to justice.”).
16 These Arizona cases incorporate the language of the RESTATEMENT OF TORTS, which
17 provides that “[t]o subject a person to liability for malicious prosecution, the proceedings
18 must have been initiated primarily for a purpose other than that of bringing an offender to
19 justice.” RESTATEMENT (SECOND) OF TORTS § 668.¹ Thus, under Arizona law, the second
20 element of the Court’s proposed final jury instructions is a correct definition of the term
21 “malice.”

22 What Plaintiffs’ proposed jury instructions do is blend the elements of malice (under
23 Arizona law) and the separate additional § 1983 element of an intent to deprive plaintiff of
24 a specific constitutional right. *See Doc. 284, Ex. D, at ¶ 5* (defining malice as being “for

25 ¹ RESTATEMENT (SECOND) OF TORTS §668 deals with the propriety of purpose element set
26 forth in § 653. This Court relied on §668 in a malicious prosecution case, noting that the
issue must go to a jury. *See Donahoe v. Arpaio*, 986 F.Supp.2d 1091, 1107 (D. Ariz. 2013)
27 (“Finally, [when there is evidence that [an ulterior] motive played a substantial part in
influencing his decision, the determination of whether the ulterior purpose was the primary
28 one is normally for the jury.””) (citing RESTATEMENT (SECOND) OF TORTS § 668)
(alterations original).

1 the purpose of denying the plaintiff a specific constitutional right or in reckless disregard of
2 that right or the truth.”). Moreover, Plaintiffs’ proposed instruction could serve to
3 eliminate entirely the Arizona requirement that the jury consider Trombi’s motive. As
4 written, Plaintiffs’ fifth element would permit the jury to find liability based on “reckless
5 disregard” without ever determining what her primary purpose actually was. This is not
6 proper; both the Arizona element of malice (a primary purpose other than to bring an
7 offender to justice) and the additional federal element (purpose to deprive a specific
8 constitutional right) must be met.

9 **II. The first explanatory paragraph of the Court’s proposed instruction is proper.**

10 Plaintiffs argue that the first explanatory paragraph of the Court’s proposed
11 instruction on malicious prosecution should be stricken as a one-sided commentary on the
12 evidence. Doc. 284 at 4-5. Not so. This definition is necessary to explain what is meant
13 by the first element of the Court’s proposed instruction, that “defendant initiated or took
14 active part” in the criminal prosecution. It is drawn from, and consistent with, Arizona law.
15 *See Adams*, 2014 WL 265660, at *3-4; RESTATEMENT (SECOND) OF TORTS § 653 cmt. g.;
16 *Tierra Ranchos Homeowners Ass’n v. Kitchukov*, 165 P.3d 173, 179 (Ariz. Ct. App. 2007)
17 (Arizona courts follow Restatement in absence of governing law to contrary).

18 This paragraph is also consistent with federal law, which holds that subsequent
19 prosecutorial action bars liability for investigating officers unless “the district attorney was
20 pressured or caused by the investigating officers to act contrary to his independent
21 judgment.” *Harper v. City of Los Angeles*, 533 F.2d 1010, 1027 (9th Cir. 2008) (quoting
22 *Smiddy v. Varney*, 665 F.2d 261, 266 (9th Cir.1981)); *see also* Defendant Trombi’s Single
23 Point Brief Regarding Malicious Prosecution (Doc. 282), at Sections I and II. By defining
24 initiation of criminal prosecution in this way, the Court has properly distilled this aspect of
25 both Arizona tort law and federal § 1983 law to guide the jury’s consideration.

26 There are key qualifiers and typographical errors that should be corrected in this
27 paragraph of the instruction. *See* Defendant Trombi’s Objection to Verdict Form and Jury
28 Instructions (Doc. 280), at 11:1-14.

1 **III. The second paragraph of the Court's proposed instruction should be stricken.**

2 Plaintiffs argue that the second explanatory paragraph of the Court's proposed
3 instruction on malicious prosecution should be stricken as a one-sided commentary on the
4 evidence. Doc. 284 at 4-5. The County disagrees with that argument, but agrees that this
5 paragraph should be stricken because it is redundant. The first explanatory paragraph
6 already outlines the two bases for attributing a criminal prosecution to investigators rather
7 than prosecutors: (1) improper pressure or (2) material misrepresentations or omissions.
8 There is no need to instruct the jury as to the contrary of these two propositions.

9 **IV. The third paragraph of the Court's proposed instruction should be stricken.**

10 Plaintiffs argue that the third explanatory paragraph of the Court's proposed
11 instruction on malicious prosecution should be included as a separate instruction.
12 Plaintiffs' proposal, however, appears to *reverse* the burden of proof. *Plaintiffs* have the
13 burden to prove, by a preponderance of the evidence, the first element of their claims: that
14 Trombi initiated prosecution (by pressuring or misleading prosecutors). *See* Part II, *supra*;
15 Doc. 282, at Sections I and II; *Smiddy v. Varney*, 803 F.2d 1469, 1471 (9th Cir. 1986)
16 (“The burden was upon Smiddy to prove facts that would overcome the presumption
17 mentioned in *Smiddy I* that the district attorney acted according to law...”).

18 As a matter of logic, a separate independent judgment instruction is redundant and
19 unnecessary. If Plaintiffs succeed in meeting their burden to show that Trombi pressured
20 or misled prosecutors, Defendants will have necessarily failed in proving prosecution was
21 independent. If Defendants prove by a preponderance of the evidence that prosecution was
22 independent, Plaintiffs will have necessarily failed to prove the same element of their
23 claims. These showings are mutually exclusive, and no purpose is served by a second,
24 separate instruction.

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2 DATED June 14, 2018.
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Respectfully submitted,
SACKS TIERNEY P.A.

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CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2018, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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